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IN THE

Supreme Court of the United States

October Term, 1982

STATE OF CALIFORNIA, *et al.*,

Cross-Petitioners,

vs.

JAMES G. WATT, *et al.*,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Question Presented.

Whether the meaning of the phrase "to the maximum extent practicable," as used in § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), is ripe for judicial determination, and, if so, whether the discussion of that term by the Court of Appeals for the Ninth Circuit is correct.

Parties to the Proceeding.

This litigation was commenced by the filing of separate complaints by the State of California and several environmental groups. Parties plaintiff included the State of California (acting by and through the Governor, the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation), the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53. A number of California cities and counties intervened as parties plaintiff in the litigation brought by the State: the Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma, and the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside, as well as the Association of the Monterey Bay Area Governments. Named as defendants, in addition to the Secretary of Interior, were the United States Department of the Interior, the United States Bureau of Land Management, Edward Hastey

(then Acting Director of the United States Bureau of Land Management) and Robert Burford (then Director Designate and now Director of the United States Bureau of Land Management). The Western Oil and Gas Association intervened as a party defendant in the litigation, as did Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Exxon Corp., Elf Aquitaine Oil & Gas, Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Amicus briefs were filed in the Ninth Circuit on behalf of the Coastal States Organization and the States of Alaska, Florida, Maine, Massachusetts, North Carolina, and Oregon.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Opinions Below.

The opinion of the Court of Appeals, DOI Pet. at 1a-33a, is reported at 683 F.2d 1253 (9th Cir. 1982). The opinion of the District Court, DOI Pet. at 34a-78a, is reported at 520 F.Supp. 1359 (C.D. Cal. 1981).[1]

[1]This cross-petition filed jointly by all of the parties plaintiff below, as identified *supra* at iv, with the exception of the City and County of San Francisco and the counties of Santa Clara and San Diego. References to the petition for a writ of certiorari of the Secretary of the Interior, *et al.* are given herein as "DOI Pet. at ____." All citations to the opinions below are to the appendices to Interior's petition, *e.g.*, DOI Pet. at 43a. Cross-petitioners hereby adopt those appendices in lieu of reproduction of the opinions below in this cross-petition. References to the petition of the Western Oil and Gas Association, *et al.*, are given as "WOGA Pet. at ____."

Jurisdiction.

The judgment of the Court of Appeals was entered on August 12, 1982. DOI Pet. at 82a. A timely petition for rehearing was denied on November 10, 1982, DOI Pet. at 83a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This cross-petition is filed pursuant to Rule 19.5 of the Rules of this Court. The petition for a writ of certiorari of the Secretary of the Interior, *et al.*, was received February 11, 1983, by cross-petitioners the Natural Resources Defense Council, Inc., *et al.*, and February 14, 1983, by the remaining cross-petitioners. The petition of the Western Oil and Gas Association, *et al.*, was received by all cross-petitioners February 9, 1983.

Statutes and Regulations Involved.

Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1):

> Each federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

15 C.F.R. § 930.32 of the regulations of the National Oceanic and Atmospheric Administration implementing § 307(c)(1):

> (a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that

compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.

The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.

See also 44 Fed. Reg. 37142 (1979).

Statement of the Case.

Cross-petitioners hereby adopt the Statement of the Case presented in their brief in Opposition to Petitions for Writ of Certiorari in *Watt v. State of California*, No. 82-1326, and *Western Oil and Gas Association v. State of California*, No. 82-1327 (filed February 8, 1983). To that Statement, cross-petitioners add the following brief statement relevant to the question presented in their cross-petition.

Part IV.E. of the opinion of the Court of Appeals for the Ninth Circuit discussed the meaning of the phrase "to the

maximum extent practicable" as used in § 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1). DOI Pet. at 19a-23a. This phrase describes the degree to which federal activities directly affecting a state's coastal zone must be consistent with that state's coastal management program. The Ninth Circuit suggested that this phrase indicates that a state's coastal program does not take "precedence when it would preclude the federal activity" nor that the federal activity need be as consistent as possible with the terms of that program. DOI Pet. at 19a. The Court of Appeals also offered a series of factors for consideration in determining whether a given federal activity was, to the maximum extent practicable, consistent with a state program. DOI Pet. at 22a.

The meaning of the phrase "to the maximum extent practicable" had not been briefed or argued by the parties prior to the issuance of the Ninth Circuit's opinion because no consistency determination had been prepared by Interior regarding Lease Sale 53. Timely petitions for rehearing on this portion of the Court of Appeals' opinion by the State of California, *et al.*, and the Natural Resources Defense Council, Inc., *et al.*, were denied November 10, 1982.

REASONS FOR GRANTING THE WRIT.

If the Court decides to grant the petitions for writ of certiorari of the Secretary of the Interior and the Western Oil and Gas Association (WOGA) in order to review the issue of whether an oil lease sale on the Outer Continental Shelf is an activity "directly affecting" the coastal zone of an adjacent state within the meaning of § 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), logically it should also review that portion of the Ninth Circuit's opinion regarding the meaning of the phrase "to the maximum extent practicable" in that provision. Part IV.E., DOI Pet. at 19a-22a. Section 307(c)(1) requires:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

The two phrases are thus both important parts of the consistency scheme applied to federal agencies by this section.

However, as set forth in their brief in opposition to the Secretary's and WOGA's petitions, cross-petitioners, the State of California, Natural Resources Defense Council, Inc., *et al.*, and County of Humboldt, *et al.*, do not believe the question presented by those petitioners to be worthy of review on certiorari by the Court. Cross-petitioners have filed this cross-petition out of an abundance of caution to insure that arguments dealing with that portion of the Ninth Circuit's opinion examining the phrase "to the maximum extent practicable" can be presented in this Court *in the event* that it grants certiorari to review the question presented by the Solicitor General and WOGA. Although cross-petitioners believe that a cross-petition is not required in this case to preserve argument on this point, the law is not entirely clear in this regard. *See, e.g., Blum v. Bacon,*

.... U.S. ...., 102 S.Ct. 2355, 2359 n. 5 (1982); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n. 11 (1976); *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976).[2]

I.

The Determination of the Degree of Consistency Required for a Federal Activity to be Consistent "To the Maximum Extent Practicable" With a State's Coastal Program Is Too Important to Be Made Outside the Context of an Actual Dispute.

Section 307(c)(1) of the CZMA is part of a broad program created by Congress to encourage cooperative federalism in the management of the nation's coastal resources. Once a state has received the approval of the Department of Commerce of its coastal zone management program, all federal activities directly affecting its coastal zone are to be conducted or supported, to the maximum extent practicable, consistently with the terms of that program. The purpose of this provision is to give coastal states comprehensive authority over the planning for and management of their coastal zones, which would be rendered piecemeal if federal activities, common on and along the nation's coastlines, were exempted from such authority. Thus, the interpretation of the consistency standard "to the maximum extent practicable" will affect the extent of the coastal states' authority systematically to protect their coastal resources and to plan for orderly coastal development. For this reason, cross-

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[2]No modification of the judgment of the Court of Appeals would necessarily be required if it were determined by this Court that the meaning of the phrase "to the maximum extent practicable" was not ripe for adjudication, as cross-petitioners contend. Insofar as that view is correct, the Court of Appeals' discussion of the phrase is dicta.

petitioners submit that this phrase should not be interpreted in the absence of a concrete factual dispute.

However, the Ninth Circuit discussed the meaning of "to the maximum extent practicable" even though that issue was and remains unripe for adjudication. The issue before the Ninth Circuit was the threshold question of whether an OCS lease sale "directly affects" the California coastal zone so as to call into play the consistency provisions of § 307(c)(1) and NOAA's regulations thereunder. Having decided that there was a direct effect, the Ninth Circuit held that Interior needed to perform a consistency determination before conducting the lease sale. The Court of Appeals also held that the lease sale had to be consistent "to the maximum extent practicable" with the California Coastal Management Program, amending the District Court's judgment that the federal lease sale activities must be conducted "in a manner consistent with California's Coastal Management Plan," DOI Pet. at 80a, which omitted the statutory qualifier "to the maximum extent practicable." DOI Pet. at 19a.

Beyond this holding the Ninth Circuit need not and should not have gone. There having been no consistency determination by the Department of the Interior, there was no information before the court concerning the manner in which Interior intended to perform its consistency obligations nor any indication of California's reaction to Interior's performance of those obligations. In short, there exists no concrete controversy between Interior and California over any specific determination of consistency between Interior's proposed lease sale and the terms of the California Coastal Management Program, nor, as a result, is there a factual context in which properly to resolve the requirements of the consistency standard.

Indeed, the question may never arise for Lease Sale 53, since the existence of an actual controversy will depend

upon the terms of a consistency determination Interior has yet to make, the unknown reaction of California to that document, and, perhaps, the outcome of mediation by the Secretary of Commerce. Were the consistency process allowed to proceed as provided by the regulations of the National Oceanic and Atmospheric Administration under § 307(c)(1), a very instructive administrative record would be compiled for future judicial determination of the proper construction of "to the maximum extent practicable," should such a determination become necessary. *See generally* 15 C.F.R. §§ 930.30-930.44.[3]

In the case of an OCS lease sale, the record would consist of the description of the particular sale itself, the supporting information required of the consistency determination, the relevant provisions of the state management program, the state's reasons for disagreement and its supporting information, and the record of the mediation proceedings, if any occurred. Without these final agency actions and the at-

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[3]In brief, NOAA's regulations require a federal agency to prepare and submit a consistency determination to a coastal state at least ninety days before final approval of an activity directly affecting that state's coastal zone. 15 C.F.R. § 930.34. This determination is required to indicate whether the proposed activity will be consistent to the maximum extent practicable with the state's coastal management program and must be based upon "an evaluation of the relevant provisions" of that program. 15 C.F.R. § 930.39(a). The determination must also include "a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement." *Id.; see also* 15 C.F.R. § 930.39(b), (c). If the affected state disagrees with the consistency determination, it must supply the federal agency with its reasons for disagreement and supporting information; it must describe how the activity will be inconsistent and what alternative measures, if any, would allow the activity to proceed consistently, to the maximum extent practicable, with the state's management program. 15 C.F.R. § 930.42(a). In cases of serious disagreement between a state and a federal agency regarding the consistency of a proposed activity, either party may call upon the Secretary of Commerce to mediate. 16 U.S.C. § 1456(h); 15 C.F.R. § 930.43.

tendant factual record, and in the absence of any concrete state-federal dispute over a completed consistency determination, the question of the meaning of "to the maximum extent practicable" has not properly arisen for judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967).[4]

II.

The Court of Appeals Undermined the Balance of Cooperative Federalism Established by Congress in the Coastal Zone Management Act in Discussing the Phrase "To the Maximum Extent Practicable" Without Reference to the Proper Sources of Statutory Construction.

Even were the meaning of "to the maximum extent practicable" ripe for judicial determination, the Ninth Circuit's discussion regarding the phrase and the factors to be con-

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[4] *Abbott Laboratories* indicates that the lack of fitness of an issue for judicial review must be weighed against any hardship to the parties of withholding consideration in determining whether or not the issue is ripe. *Id.* Here, the opinion of the Court of Appeals itself makes clear that no hardship would result had it not engaged in its discussion of the meaning of "to the maximum extent practicable." The Ninth Circuit acknowledges that:

> The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated. . . . [V]erbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

DOI Pet. at 22a.

In other words, examining the meaning of "to the maximum extent practicable" in a factual vacuum is of little assistance in resolving concrete consistency disputes that may arise in the future. Interestingly enough, the Secretary of the Interior appears to agree: "[T]he Ninth Circuit's suggestions concerning a standard for consistency at the leasing stage are inherently vague." DOI Pet. at 19. While the federal petitioners offer this opinion to bolster their contention that no consistency determination is appropriate at the leasing stage, it plainly supports cross-petitioners' argument that the meaning of "to the maximum extent practicable" is not properly examined outside a specific factual setting.

sidered in its application would be incorrect. An examination of the relevant sources of statutory construction demonstrates that the Ninth Circuit's discussion runs counter to the comprehensive scheme of federal-state coordination that Congress created in the CZMA to allow states to assume a strong role in the management of their coastal resources.

NOAA, the agency responsible for overseeing the implementation of the CZMA, has long defined "consistent to the maximum extent practicable" to mean that federal activities directly affecting the coastal zone must be "fully consistent with [state coastal] programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations." 15 C.F.R. § 930.32 (emphasis added). The NOAA definition, which is due substantial judicial deference,[5] is fully in accord with the purposes and policies of the CZMA and the legislative history of § 307(c). H. Rep. No. 1049, 92d Cong., 2d Sess. 20 (1972); Conf. Rep. No. 1544, 92d Cong., 2d Sess. 15 (1972); *see also* S. Rep. No. 277, 94th Cong., 1st Sess. 36-37 (1975). In ignoring these critical sources of statutory construction, the Ninth Circuit has suggested a definition that would deprive coastal states of the strong management role Congress granted them in enacting the CZMA.

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[5]*See* DOI Pet. at 16a-18a; *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1310 (9th Cir. 1979).

CONCLUSION.

If the petitions for a writ of certiorari of the Secretary of the Interior and WOGA are granted, this cross-petition for a writ of certiorari should also be granted.

Respectfully submitted,

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